Supreme Court, U.S.
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No. 99-1847

IN THE

Supreme Court of the United States

WILLIAM C. DEWBERRY,

Petitioner,

v.

TEXAS UTILITIES ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Texas Utilities Electric Company is now known as TXU Electric Company. It is a wholly-owned subsidiary of TXU Corp. TXU Corp. is a publicly held company, having no known parent company.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, issued its Memorandum Order, dated July 15, 1999, granting Texas Utilities Electric Company's ("Respondent") Motion for Summary Judgment and dismissing Petitioner's claims. (Pet. App. A-3).[1]

The Petitioner appealed the decision to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). The Fifth Circuit affirmed the district court's order granting summary judgment in favor of Respondent, per curiam, by order dated February 17, 2000. (Pet. App. A-1).

STATEMENT OF THE CASE

Petitioner brought this suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII"), the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981, and the Texas Commission on Human Rights Act, Texas Labor Code § 21.051 (Vernon 1996), claiming that he was discriminatorily denied a promotion to three positions based on his race, color and national origin.[2]

Petitioner's representations to this Court of certain facts are misleading, and in some instances, inaccurate. Because Petitioner was represented by different counsel before the district court, Respondent provided Petitioner the benefit of the doubt during the proceedings before the Fifth Circuit and kindly pointed out to Petitioner and his counsel the factual misrepresentations made to the Fifth Circuit. Despite this, Petitioner makes the same representations to this Court.

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1. All references or citations to "Pet. App." refer to the Appendices contained in the Petition for Writ of Certiorari.

2. Petitioner also claimed below that he was denied two of the three promotions in retaliation for his prior complaints of discrimination. In his Petition for Writ of Certiorari, however, Petitioner fails to challenge the lower courts' decisions granting summary judgment on his retaliation claims and, accordingly, the propriety of dismissing such claims is not an issue presented to this Court.

Petitioner's misrepresentations of the facts are addressed in Respondent's Statement of the Case, as well as in it's discussion concerning the reasons this Court should deny the writ.

(FACTS)

Respondent is a public utility that generates, transmits and distributes electricity. Petitioner has been employed by Respondent or its predecessor company since June 13, 1967. Petitioner currently works as a Senior Engineering Technician (hereinafter "Senior Technician") in Respondent's distribution division. The job duties of a Senior Technician consist primarily of providing technical support and advice to distribution crews with respect to the construction, operation and maintenance of Respondent's electrical distribution systems. During the time period relevant to Petitioner's claims, he was employed in Central Region — — one of five regions within the distribution division. (R2. 143: ¶¶ 5-7; R2. 147 ¶ 7; R2. 217: 7-9; R2. 237: 9-10; R2. 281: 1-10, 21-25).

I. THE CENTRAL REGION LEAD TECHNICIAN POSITION.

In the Spring of 1997, Central Region was restructured to create a Lead Technician position at each of the three service centers in the region. Prior to that time, the highest step of progression in Central Region's technician job classification was Senior Technician. Gary Roberts, Manager of Central Region, approved the restructuring because the Lead Technician position had a slightly higher salary range and afforded technicians the ability to acquire leadership and supervisory experience. Lead Technicians are responsible for performing technical work typically performed by Senior Technicians, and also performing leadership and supervisory-type duties, such as assigning work orders to other technicians, evaluating the performance of employees in the technician classification, and addressing and resolving customer complaints. (R2. 122: ¶ 6; R2. 144 ¶¶ 9, 11).

A. The Selection Process

All 11 Senior Technicians in Central Region, including Petitioner, were interviewed, and considered for, the position of Lead Technician. Ralph Reeves, Southwest Service Center Manager, took the lead role in overseeing the selection process, and assembled an interview panel comprised of the manager and operations supervisor from each of the three service centers in Central Region. Because the primary difference between the Senior Technician and Lead Technician positions is the supervisory-type duties Lead Technicians are responsible for performing in addition to the technical work, the Interview Panel placed an emphasis on selecting the candidates who possessed not only good technical skills, but demonstrated superior communication and leadership abilities. (R2. 16: ¶ 15; R2. 124: ¶ 14).

During the interview process, Mr. Reeves asked each candidate a list of questions he had designed to enable the Interview Panel to evaluate and compare each candidates' ability to communicate and articulate their ideas effectively, and to assess their potential leadership abilities. Mr. Reeves also formulated a selection grid to assist the Interview Panel in selecting the most qualified candidates, which contained the following criteria: (i) communication; (ii) leadership; (iii) knowledge (technical knowledge); (iv) attitude; (v) experience (years of experience as a technician); (vi) respect (respect by, and to, peers and supervisors); and (vii) planning ability. (R2. 124: ¶¶ 12, 13; R2. 141). Similarly, Mr. Vestal, North Service Center Manager, developed a list of topics related to the Lead Technician position that he was prepared to discuss, or ask the candidates questions about, during the interview. (R2. 14: ¶ 10; R2. 21).

After completing the interview process, the Interview Panel initially took a straw poll to determine how each member had preliminarily ranked the candidates. No one on the Interview Panel had ranked Petitioner in the top three. (R2. 15-16: ¶ 14; R2. 17: ¶ 21; R2. 125: ¶¶ 15, 16; R2. 152: ¶ 9; R2. 455: 16-20,

2-11). It was the consensus opinion of the Interview Panel that, during the interview Petitioner did not give specific answers to their questions, or gave very vague answers, and did not articulate his ideas effectively. For example, each candidate was asked what he or she would do to improve system performance or reliability in the distribution operations group. Most all of the candidates responded with some type of plan they would focus on to improve customer reliability, and approximately fifty-percent responded with specific ideas such as increasing tree trimming, improving feeder maintenance, and performing other various maintenance activities that increase reliability in providing electric service. Petitioner responded by stating: "I don't know. I would have to think about it." Accordingly, the Interview Panel concluded that Petitioner did not exemplify communication and leadership skills as good as the successful candidates.[3] (R2. 15: ¶ 12; R2. 17: ¶ 21; R2. 127: ¶ 21).

With respect to overall job knowledge and technical experience, the three successful candidates had *more* years of experience in the technician job classification than Petitioner. Rodger Leger had ten years *more* technician experience, and Bill Barnes and Darrell Berg had six years and three years *more* experience, respectively, than Petitioner. Furthermore, all three individuals, like Petitioner, had an Associates Degree in Applied Arts & Sciences, and had received equal or more favorable

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3. The Interview Panel also considered their own day-to-day work experiences in selecting the candidates with the most effective leadership skills. It had been Mr. Vestal's experience in supervising Mr. Barnes that he was considered to be the "informal leader" among the technicians at the North Service Center, and was often looked to for technical information, advice and direction. Furthermore, it was Mr. Reeves' perception that Petitioner was not as approachable as he should be to be an effective leader. On certain occasions in the past, Mr. Reeves had seen Petitioner at the Northeast Service Center and had spoken to, or acknowledged Petitioner with a greeting. Petitioner typically would not speak to Mr. Reeves, or would give a short, curt response and then just walk off. (R2. 17: ¶ 21; R2. 126: ¶ 19; R2. 127: ¶ 22).

performance evaluations than Petitioner over the past few years. (R2. 25: ¶¶ 8, 9; R2. 297).

Accordingly, the Interview Panel reached a consensus decision that Bill Barnes, Rodger Leger and Darrell Berg possessed superior technical, communication and leadership skills compared to the other candidates, including Petitioner, and were overall the most qualified candidates for the position. (R2. 18: ¶ 22; R2. 125: ¶ 17).

B. Petitioner's internal complaints of discrimination and Respondent's attempt to assist Petitioner in preparing for future promotion opportunities

Pursuant to Petitioner's request, Gary Roberts, Manager of Central Region,[4] met with Petitioner for approximately 2 hours to discuss the Interview Panel's selection process. Mr. Roberts explained to Petitioner that all three candidates: (i) had more years of technical experience, (ii) were exceptional performers, (iii) were considered to be the "informal leaders" in their respective work groups, (iv) were often looked to for advice and direction from other technicians based on their technical knowledge, and (v) had exhibited leadership abilities. Mr. Roberts also gave Petitioner feedback on the areas in which he could improve his performance and his ability to be promoted in the future. Specifically, Mr. Roberts told Petitioner that he should focus on improving his leadership, communication and interview skills. (R2. 146: ¶¶ 16, 17, 18; R2. 309: 22-25; R2. 310: 1-7; R2. 315: 8-24; R2. 441). Based on Mr. Roberts' own personal observations, the successful candidates had positive attitudes and were approachable by their co-workers. Mr. Roberts had personally observed Petitioner, however, being rude and confrontational to an instructor during a leadership training course a few years before, and had recently witnessed

4. Petitioner incorrectly states that Mr. Roberts was a member of the Interview Panel. (Petition for Writ of Certiorari ("Pet.") p. 6). Mr. Roberts was the Manager of Central Region and the members of the Interview Panel reported to him. (R2. 142: ¶ 3; R2. 145: ¶ 13).

Petitioner's refusal to participate in a Safety Bingo session during a recent Company safety meeting. Mr. Roberts explained to Petitioner that leaders lead by example and that this type of conduct was not indicative of a leader. In addition, Mr. Roberts emphasized the importance of continual training to improve his opportunities for promotion.[5] Petitioner responded that he "was not interested" in taking any more "damn training." (R2. 146: ¶¶ 12, 18; R2. 147: ¶ 19).

Petitioner subsequently met with Mr. Roberts' immediate superior, Paul Williams, Vice President of Distribution. After their meeting, Mr. Williams requested that Mr. Roberts assist Petitioner in preparing for future promotion opportunities by directing Petitioner's supervisor to: (i) arrange additional training for Petitioner that would improve his potential for future promotions, and (ii) evaluate Petitioner's performance and discuss the evaluation with Petitioner. With assistance from the Company's training and development department, Petitioner's supervisor, Ritchie Croft, identified two training programs for Petitioner to attend that focused on teaming with co-workers and personal effectiveness. He also completed an evaluation of Petitioner's performance as a Senior Technician. On August 19, 1997, Mr. Croft met with Petitioner to discuss the training programs and the recently completed performance evaluation. (R2. 147: ¶ 21; R2. 155: ¶¶ 20, 21; R2. 323: 14-25, R2. 326: 5-9, 17-21; R2. 327: 9-20; R2. 332: 22-25; R2. 333: 1-22; R2. 334: 8-14).

Petitioner subsequently sent an internal e-mail to Erle Nye, Chairman of the Board and Chief Executive Officer of Texas

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5. The successful candidates had participated in several training classes in which Petitioner had chosen not to participate. Mr. Roberts expressed to Petitioner his disappointment in Petitioner's decision not to participate in the Company's Craft Advancement Progression Skills Training Program ("CAPS"). Other technicians with an Associates Degree, including Mr. Barnes and Mr. Berg, participated in CAPS and had learned valuable information concerning distribution operations. (R2. 147: ¶¶ 19, 20; R2. 324: 5-22).

Utilities Company, requesting that Mr. Nye review the selection process for the Lead Technician position. (R2. 2: ¶ 6). Petitioner's request was forwarded to Ms. Debbie Dennis, Human Resources Support and Diversity Manager, and Ms. Dennis subsequently met with Petitioner to discuss his concerns about the selection process. During the meeting, Petitioner requested a comparison chart that reflected his qualifications in comparison to the successful candidates. When Ms. Dennis attempted to schedule a follow-up meeting with Petitioner to present him with the comparison chart he refused to meet with her. Petitioner told Ms. Dennis that unless she had a supervisor position for him, there was no need for them to meet. (R2. 2: ¶¶ 6, 7; R2. 3: ¶ 8; R2. 338: 23-25; R2. 339: 1-4; R2. 340: 12-16; R2. 346: 23-25; 347: 1-2, 3-15, 21-23). Subsequently, Ms. Dennis arranged for John Self, Economic and Business Development Manager, an African-American male, to contact Petitioner to discuss Petitioner's concerns and to offer career mentoring. Petitioner, however, refused to meet with Mr. Self. (R2. 3: ¶ 10).

II. THE ARLINGTON SUPERVISOR POSITION

In November 1997, an opening existed for a Distribution Operations Supervisor in the Arlington Service Center (the "Arlington Supervisor"). The hiring manager, Ralph Reeves,[6] posted the job opening through the Company's internal process for promotions and transfers (hereinafter the "APT Process"). (R2. 27 ¶ 14; R2. 131: ¶¶ 35, 36). The position description posted was a standard, company-wide job description for the operations supervisor job classification, and contained the minimum qualifications of the position. Because the successful candidate would be responsible for supervising approximately 21 employees and several contract workers, Mr. Reeves also

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6. A few months after the selection process for the Lead Technician position in Central Region, Mr. Reeves transferred to the Arlington Service Center in Fort Worth Region to serve as the Systems Operations Manager.

identified prior lead or supervisory experience as an essential criteria in selecting the successful candidate. (R2. 27: ¶ 15; R2. 132: ¶ 37).

Approximately 37 employees, including Petitioner, submitted an application for the position, 15 of which had prior job experience in a supervisory or lead capacity. Accordingly, Mr. Reeves and Ms. Morton, the personnel representative, determined that it would be appropriate to interview only those applicants who possessed prior supervisory experience. Because Petitioner had no prior lead or supervisory experience, he was one of the approximately 27 applicants who were *not* interviewed. Jerry Griffin, a 27-year employee of Respondent, was selected for the position. Mr. Griffin possessed an Associates Degree, and almost eight years of prior supervisory experience. Mr. Reeves concluded that, based on Mr. Griffin's work experience and his conduct during the interview process, he was the most qualified candidate for the position. (R2. 13: ¶ 40; R2. 28: ¶¶ 17, 19, 20; R2. 29: ¶ 22; R2. 131: ¶ 35; R2. 132: ¶ 39; R2. 133: ¶ 41; R2. 357: 12-25; R2. 358: 21-24).

III. THE MESQUITE LEAD TECHNICIAN POSITION

In April 1998, an opening existed for a Lead Technician position at the Mesquite Service Center in the Company's Northern Region (the "Mesquite Lead Technician"). Eighteen employees submitted an application through the APT Process, and 11 of the applicants were interviewed, including Petitioner. They were interviewed by a three-member panel: Gilbert Rascon, Mesquite Distribution Operations Manager, Kyle Davis, Mesquite Distribution Operation Supervisor, and Tom Wooten, Repair and Construction Supervisor. In selecting the successful candidate, they considered the following criteria: (i) job knowledge; (ii) leadership skills; (iii) qualifications; (iv) interpersonal skills; and (v) communication skills. (R2. 29: ¶ 25; R2. 166: ¶ 5; R2. 167: ¶ 5; R2. 171: ¶ 3; R2. 172: ¶ 6; R2. 180; R. 366: 4-16; R2. 367: 8-10; R2. 368: 4-9).

Prior to the interview process, Mr. Davis formulated a list of ten questions to ask each of the candidates. After Petitioner had been asked a few of the questions, he inquired as to who had formulated the questions and implied the questions were somewhat foolish. Petitioner also questioned the panel as to how they could possibly select a candidate based on a 30-40 minute interview, and then implied that the panel had already selected the candidate it desired to promote prior to the interview process. Mr. Rascon explained to Petitioner that the panel most definitely had not reached a decision as to who to promote, and that, in selecting the candidate, it would consider not only the interview process, but each candidate's work experience and qualifications included on their application. When Mr. Rascon asked Petitioner additional questions, he did not respond or gave brief, curt responses, and then simply referred the panel to his personnel file. The members of the interview panel were stunned by Petitioner's interview. They perceived Petitioner's conduct toward them to be rude, confrontational and non-responsive, and concluded he did not possess the requisite interpersonal and leadership skills necessary for the position.[7] (R2. 166: ¶ 5; R2. 167-168: ¶¶ 7, 8; R2. 173: ¶¶ 7, 8, 11; R2. 380: 21-25; R2. 381: 1-11).

Subsequent to Petitioner's interview, Mr. Wooten informed Mr. Rascon and Mr. Davis that he had observed a tape-recorder in Petitioner's briefcase that had remained open during the interview. Based on this fact, Mr. Rascon requested Mr. Davis to make a written record of the events that occurred during the interview. Petitioner represents to the Court that Mr. Davis recorded the interview with Petitioner. (Pet. p. 11). This is inaccurate and misleading to the Court. It was Petitioner, not Mr. Davis, who tape-recorded the interview, and Petitioner admitted in his deposition that he secretly taped the interview. (R2. 168: ¶ 9; R2. 173: ¶ 10; R2. 178; R2. 390-395).

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7. If Petitioner had not approached the interview process in the manner that he did, based on his job knowledge and experience, he would have been one of the top 2 or 3 candidates. (R2. 169: ¶ 12; R2. 173: ¶ 11).

After the conclusion of the interview process, Dennis Norman was selected for the position. Mr. Norman had been employed by Respondent, or its predecessor, since 1968, and had 5 years experience as a technician. Mr. Rascon and Mr. Davis concluded that Mr. Norman clearly had superior communication, leadership and interpersonal skills. (R2. 169: ¶ 13; R2. 174: ¶ 12).

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT'S DETERMINATION THAT SUMMARY JUDGMENT FOR RESPONDENT WAS PROPER IS CONSISTENT WITH THIS COURT'S RULING IN *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*

The evidentiary framework for analyzing an employment discrimination case brought under Title VII was set forth initially by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this framework, the plaintiff bears the initial burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. *Id.* at 1824. If the plaintiff proves a *prima facie* case, a presumption of intentional discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 508-09, 113 S. Ct. 2742, 2747 (1993) (*citing*, *McDonnell Douglas*, 411 U.S. 792). If the defendant comes forward with a legitimate, non-discriminatory reason for its actions, the inference of discrimination raised by the plaintiff's *prima facie* case is dissolved, and the burden then shifts back to the plaintiff to prove that the employer's articulated reasons are a pretext for unlawful discrimination. *St. Mary's*, 509 U.S. at 515-17.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court recently clarified its holding in *St. Mary's* regarding a plaintiff's

evidentiary burden in proving pretext and sustaining a finding of liability for intentional discrimination under the Age Discrimination in Employment Act ("ADEA").[8] The Court held that a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, *may*, but will not always, permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves*, 120 S. Ct. at 2109.

In *Reeves*, the plaintiff was 57 years old when his employment was allegedly terminated for failing to maintain adequate attendance records. In support of its termination decision, the employer contended, among other things, the plaintiff's inadequate recordkeeping posed a serious problem for the company because it could result in expensive union grievances and arbitration cases and cost the company money in overpaid wages. *Id.* at 2107. At trial, however, the plaintiff put forth substantial evidence, some of which was undisputed, that the employer's proffered reason was false, including evidence that: (i) the plaintiff had properly maintained attendance records; (ii) the company's automated timeclock frequently malfunctioned and failed to scan employees' timecards properly, which could account for the errors in the records; (iii) the plaintiff's manager, not plaintiff, was responsible for citing employees for attendance violations; (iv) the plaintiff's manager, not plaintiff, was responsible for the overpayment of an employee who should have been reported as absent; (v) not a single union grievance or employee complaint had arisen from plaintiff's record keeping; and (vi) the company had never even calculated the overpaid wages allegedly attributable to plaintiff's mistakes. *Id.* at 2107-08. Perhaps most importantly, the plaintiff also produced evidence that the

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8. Although *Reeves* involved the standard for granting judgment as a matter or law, under Fed. R. Civ. P. 50, as it applied to a claim for relief under the ADEA, Respondent recognizes that its holding also applies to the standard for granting summary judgment under Rule 56, and to claims for relief under Title VII and 42 U.S.C. § 1981, as well.

decisionmaker behind his termination harbored age-based animus toward him. Specifically, the decisionmaker told the plaintiff he "was so old [he] must have come over on the Mayflower" and that plaintiff "was too damn old to do [his] job." This Court held that, considering all of the evidence put forth by the plaintiff that the employer's proffered reason was false and the additional evidence that the decisionmaker harbored age-based animus against the plaintiff, a reasonable jury could find that the employer had engaged in unlawful discrimination. *Id.* at 2110-11. In so holding, the Court reversed the Fifth Circuit's grant of judgment as a matter of law for the employer.[9]

This Court emphasized, however, that not all cases would involve the magnitude of evidence put forth by the plaintiff in *Reeves*. *Id.* at 2109. In this regard, the Court stated, "certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* For instance, an employer would be entitled to judgment as a matter of law where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision" and where **"the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."**[10] *Id.* (Emphasis added).

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9. The Court found that the Fifth Circuit's standard requiring the plaintiff to present "sufficient evidence that his age motivated [the employer's] employment decision" in order to sustain a jury finding of liability for unlawful discrimination was improper. As the Court stated, the Fifth Circuit "erred in proceeding from the premise that a plaintiff must always introduce additional independent evidence of discrimination." *Reeves*, 120 S. Ct. at 2109.

10. In determining whether an employer is entitled to judgment as a matter of law, relevant factors include "the strength of the plaintiff's

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Moreover, with respect to the plaintiff's burden of proving pretext, the Court reiterated that it is insufficient for the factfinder to merely disbelieve the employer's articulated reason; rather "the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 2108, *citing St. Mary's* at 519 (emphasis in original). Along these lines, the ultimate burden of proving intentional discrimination remains at all times with the plaintiff. *Id.* at 2106, *citing Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

In the case *sub judice*, the parties do not dispute that Petitioner has established a *prima facie* case and Respondent has articulated a legitimate, non-discriminatory reason for its decision not to promote Petitioner to the positions at issue. Thus, the sole issue is whether Petitioner has set forth sufficient evidence to prove that Respondent's articulated reason is a mere pretext for unlawful discrimination. *St. Mary's*, 509 U.S. at 508, 510-11. The district court, with affirmance by the Fifth Circuit, found that Petitioner failed to create a fact issue as to pretext and presented no evidence that he was not promoted because of his race, and based its grant of summary judgment for Respondent thereon. (Pet. App. A-14, 17, 19, 26). Despite this Court's subsequent holding in *Reeves*, Respondent submits that summary judgment for Respondent is still proper. This case clearly presents an instance where, as articulated by this Court in *Reeves*, no rational factfinder could possibly conclude that discrimination occurred. *See Reeves*, 120 S. Ct. at 2109. Petitioner has not created a single issue of fact as to whether Respondent's reasons for failing to promote him to the positions at issue are false. To the contrary, in support of his claims of discrimination, Petitioner relies merely on his own subjective and unsubstantiated beliefs that he was discriminated against,

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(Cont'd)

prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 2109.

which are contradicted by the substantial evidence in the record. Accordingly, under *Reeves*, Petitioner is not entitled to relief on any of his claims and Respondent asserts that his Petition for Writ of Certiorari should be denied.

A. No Rational Factfinder Could Conclude That Petitioner Was Discriminatorily Denied A Promotion To The Lead Technician Position In Central Region Because Petitioner Has Created No Genuine Issue of Fact as to Pretext and There Is Ample Uncontroverted Evidence in the Record That Petitioner Was Not Subject to Discrimination.

The uncontroverted evidence establishes Petitioner was not discriminated against by Respondent in its selection for the Lead Technician position. As stated above, the six-member Interview Panel made a consensus decision that, based on the interview process and their knowledge concerning the candidates' work history, prior job performance and technical background,[11] Bill Barnes, Darrell Berg and Rodger Leger possessed superior qualifications with respect to the job-related criteria than the other candidates, including Petitioner.[12] Specifically, they concluded that the successful candidates possessed superior technical, communication and leadership skills in comparison to the other candidates. (R. 18: ¶ 22; R. 125: ¶ 17). Petitioner

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11. The members of the Interview Panel had been employed by the Company between 25 and 40 years, and had each worked with, or supervised, many of the candidates for the Lead Technician position. As a result, although each member of the Interview Panel was not familiar with the work history and background of each candidate, the Interview Panel, as a whole, was generally familiar with each candidates: (i) years of service in the technician job classification; (ii) educational background; (iii) work history and past performance evaluations; and (iv) technical abilities. (R. 126: ¶¶ 17, 19; R. 151: ¶ 7).

12. Petitioner admits that under these circumstances, the Interview Panel's decision would not be discriminatory. (R2. 249: 15-25; R2. 250: 1-2).

does not contest the propriety of these considerations by the Interview Panel. Indeed, he admits that in selecting individuals for the Lead Technician position, it was appropriate for the Interview Panel to consider criteria such as: communication skills; respect of peers; approachability by co-workers and subordinates; breadth of technical knowledge and experience; and length of service or experience in the technician job classification. Petitioner also admits that it would be appropriate to assess these skills and criteria by considering a candidate's: (i) performance during the interview process; (ii) past job performance and evaluations; and (iii) references from past supervisors. (R2. 218: 15-25; R2. 219; R2. 239: 3-9; R2. 240: 12-24; R2. 241: 21-25; R2. 244: 10-14; R2. 245: 22-25; R2. 246: 7-15; R2. 248: 15-25; R2. 249: 1-9; R2. 298: 1-12; R2. 378: 22-25; R2. 379: 1-7; R2. 380: 1-15).

Furthermore, Petitioner admits that he has no evidence that even suggests racial animus on the part of the Interview Panel:

> **Q:** [A]re there *any facts* which would support your contention or which support your contention *that the six individuals that were on the interview panel based their decision not to promote you on your race*?
>
> **A:** *I have no facts.*

(R2. 351: 24-25; R2. 352: 1-4). (Emphasis added). Petitioner also admits that, other than the fact he was not selected for the Lead Technician position and his belief he was more qualified, he has no evidence that any member of the Interview Panel has ever discriminated against him based on his race.[13] (R2. 353: 19-23; R2. 354: 13-25; R2. 355; R2. 356: 2-9, 15-25; 357: 1-11).

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13. When asked what evidence he had to support his claim that he had been discriminated against, Petitioner responded that he was black, the successful candidates were white, and he believes he was (Cont'd)

As his own testimony shows, Petitioner relies on nothing more than unsubstantiated allegations that he was more qualified than the successful candidates and empty accusations that the selection process was unfair to support his claim of discrimination. (Pet. p. 19). This is far from sufficient to show pretext — it is well-recognized that unsubstantiated assertions are not competent summary judgment-evidence. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (the non-movant may not rest on mere conclusory allegations and must do more than simply show some "metaphysical doubt as to the material facts"); *Grimes v. Tex. Dept. of Mental Health & Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996), *citing*, *Douglas v. United Serv. Automobile Assoc.*, 79 F.3d 1415, 1429 (5th Cir. 1996) (*en banc*) ("conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the non-movant's burden").

1. There is no substantial disparity between the qualifications of Petitioner and the successful candidates and, therefore, any difference in the qualifications is insufficient to create an issue of fact as to pretext.

In an attempt to show pretext, Petitioner claims that he was more qualified than the successful candidates because he: (i) had been employed by Respondent "longer than the successful candidates;" (ii) had been working in the technician job since 1983; (iii) had more technical responsibility in terms of the number of feeders, transfer switches, and dual-feed customers located in his assigned territory; and (iv) had received an "outstanding" performance review in his most recent

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(Cont'd)

more qualified than the successful candidates. (R2. 414-416; R2. 417: 1-18). This is insufficient to create an inference of discriminatory intent. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997); *Bowens v. U.T. Southwestern Med. Ctr.*, 1998 U.S. Dist. LEXIS 19423, *15-16 (N.D. Tex. May 29, 1998).

performance evaluation. (Pet. p. 4-7, 12). None of these claims is sufficient to create a fact issue as to pretext.

It is undisputed that Rodger Leger had more years of work experience with Respondent than Petitioner, and that all three of the successful candidates had between 3 to 10 years *more* experience in the technician job classification than Petitioner. Petitioner was promoted into the technician job classification in 1983, while Messrs. Leger, Barnes and Berg entered the technician job classification in 1973, 1977, and 1980, respectively. (R2. 3, 6; R2. 25: ¶¶ 8, 9; R2. 40). Even assuming, *arguendo*, Petitioner's statistics concerning the number of feeders, transfer switches and dual-feed customers assigned to him in his territory are correct, this does not indicate that he was more qualified or a better technician than the successful candidates. Each Senior Technician, including Petitioner, is assigned a particular territory within Central Region and due to the differences in a given territory (*i.e.*, commercial v. residential customers), one Senior Technician may have more feeders, transfer switches, or dual-feed customers in his or her particular territory than in others. This factor alone is not indicative as to which technician has better technical knowledge and experience and certainly is not reflective of which technician possesses superior leadership and communication skills. (R. 128: ¶ 26).

Petitioner's claim that he received an "outstanding" performance review by Mr. Croft on his most recent performance evaluation prior to the selection process (Pet. p. 4) is indisputedly false and misleading to the Court and, in any event, is not substantial evidence that he was more qualified than any of the successful candidates. In the performance evaluation to which Petitioner refers and cites to the record, he was rated as "competent" in his performance, *not* outstanding. (R3. 291, 295 (*See* XVI. Comments)). In addition, the evaluation was not conducted by Mr. Croft, but rather by Petitioner's prior supervisor, Wiley Beasley, in 1993 — almost four years prior to the selection process for the Lead Technician Position. (R3. 291, 295). Furthermore, Petitioner fails to direct the Court

to the prior performance evaluations of the successful candidates. In fact, all three successful candidates had received comparable or *more favorable* performance ratings than Petitioner on their past two performance evaluations. (R2. 25-26: ¶¶ 8, 9). Furthermore, the fact that Croft stated in Petitioner's August 1997 Performance Review that he was "ready for advancement" is not substantial evidence that the other candidates were not also ready for advancement or were not more qualified than Petitioner and, thus, is not sufficient evidence of pretext.[14]

At most, Petitioner shows that his technical skills are comparable to the successful candidates. He does not show that he was clearly better qualified. To find discriminatory intent in a failure to promote case, there must be a "*substantial disparity*" in the qualifications of the candidates. *See EEOC v. Louisiana Office of Community Servs.*, 47 F.3d 1438, 1445 (5th Cir. 1995) (*citing Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).

In any event, it is undisputed that the Interview Panel placed substantial emphasis on the candidates' communication and leadership skills. (R2. 125: ¶ 14; R2. 16: ¶ 15). Thus, even if the evidence supports a finding that Petitioner was "as technically qualified" as Messrs. Barnes, Berg and Leger, there is absolutely no evidence to support a finding that Petitioner has superior or even comparable leadership or communication skills. In fact, the evidence is clearly to the contrary.

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14. Again, Petitioner misleads the Court by asserting that Petitioner received Mr. Croft's August 1997 performance review prior to the selection process for the Lead Technician Position. (Pet. p. 4, 12). The selection process for the Lead Technician Position occurred in April 1997, and Croft's August 1997 performance review was conducted at the direction of Mr. Williams after Petitioner's complaints of not being selected for the position. (R2. 143: ¶ 8, 144: ¶ 9, 155: ¶ 21).

2. Petitioner's dissatisfaction with one of the criteria utilized by the Interview Panel and with certain aspects of the selection process is insufficient to create an issue of fact as to pretext.

Petitioner contends that, because Respondent acknowledges the successful candidates would have the opportunity to "acquire leadership and supervisory experience," the Interview Panel's decision to consider leadership skills in determining who to promote is suspect and evidences discriminatory intent. (Pet. pp. 5, 11). This argument is nonsensical. Obviously, an appropriate consideration when promoting an individual into a leadership role is the individual's demonstrated leadership skills and abilities, notwithstanding the fact that the candidate will have the opportunity to "acquire experience" in utilizing these skills if promoted.[15] A plaintiff cannot raise fact issues simply by attacking the employer's stated business reasons for its actions, but must instead demonstrate a nexus between the employment action and the alleged unlawful discrimination. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir. 1993), *cert. denied*, 510 U.S. 976 (1993). *See also Guthrie v. Tifco Indus.*, 941 F.2d at 374, 378 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992) (recognizing that the intent of anti-discrimination statutes is not to be a vehicle for "judicial second-guessing" of an employer's business decisions or to turn courts into personnel managers). Clearly, Petitioner has not made such a showing and, thus, cannot create a fact issue as to pretext.

Petitioner also points to several facts surrounding the selection process, other than the selection criteria, which he believes show pretext. First, Petitioner contends that because each member of the Interview Panel did not review each candidates' personnel file prior to the interview process, the Interview Panel's claim to have considered the candidate's job

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15. In fact, Petitioner admitted that it was appropriate for the Interview Panel to consider each candidate's leadership skills in selecting the successful candidates for the position. (R2. 249: 15-25).

knowledge and experience is suspect. (Pet. p. 12). It is undisputed, however, that all eleven candidates interviewed and considered for the Lead Technician position reported to one supervisor and one manager on the Interview Panel. It is also undisputed that the members of the Interview Panel had been employed by Respondent between 25 and 40 years, and had worked with, or supervised, most of the candidates. As a result, the Interview Panel, collectively, was familiar with each candidates' job knowledge and experience. (R2. 16: ¶ 17, 21; R2. 126: ¶¶ 1, 19; R2. 151-152: ¶ 7; R2. 451; R2. 457).

Second, Petitioner claims Respondent's failure to post the Lead Technician position through its APT process evidences pretext. (Pet. pp. 5-6). Yet, because Central Region was merely reclassifying three of the eleven existing technicians to the new Lead Technician position, and was not increasing the overall number of technicians, Mr. Roberts, the Manager, made a business decision that it was not appropriate to post the position. Otherwise, in the event an applicant outside Central Region was selected for one of the three Lead Technician Positions, it would have necessarily resulted in the layoff of one of the current technicians in Central Region. (R2. 145: ¶ 12). Therefore, the decision not to post the position was actually to Petitioner's benefit and in no way creates a fact issue as to pretext for unlawful race discrimination.

Third, Petitioner claims that, because the members of the Interview Panel specifically remembered the interview question asked of each candidate concerning the candidate's ideas or proposals to improve system performance, the interviewers "colluded" in explaining their decision that the successful candidates possessed superior communication and leadership skills. (Pet. pp. 6, 12). Petitioner's unsupportable claim is inconsistent with the actions of the Interview Panel prior to, during, and after the interview process, and inconsistent with the undisputed summary judgment evidence. In this regard, Mr. Reeves testified that he formulated a list of questions to be used during the candidates' interviews, one of which related to the

candidate's suggested plan to improve Respondent's electric system's operations and reliability. Similarly, Mr. Vestal testified that he developed a list of topics to discuss during the interview, one of which involved improving system performance. (R2. 14: ¶ 10; R2. 124: ¶ 12; R2. 127: ¶ 21). The Interview Panel's recollection of the candidates' responses to this question is also consistent with Mr. Vestal's notes taken during the interview process, which reflect each of the candidate's responses to this particular question, including Petitioner's response that he would have to assess the situation at that time and think about it. (R2. 15: ¶ 12; R2. 21: Ex. A; R2. 32-39). Mr. Vestal also explained that this question, and the candidates' responses to it, stuck out in his mind more than the others because the question provoked a thought process with the interviewee and should have initiated some conversation between the interviewee and the Interview Panel concerning the operation and performance of Respondent's electric distribution system and how to improve the process. Indeed, most all of the candidates communicated to the Interview Panel some type of plan or item(s) they would focus on, while Petitioner merely stated: "I don't know. I would have to think about it." (R2. 15: ¶¶ 12, 13; R2. 127: ¶ 21). The fact that the Interview Panel was able to recall such a response is understandable given the circumstances and is clearly not sufficient to establish pretext.

Fourth, Petitioner claims that the statement allegedly made by his supervisor, Ritchie Croft, concerning what Petitioner needed to do to be rated a commendable performer evidences pretext. (Pet. pp. 7, 12). Croft testified that the analogy he often uses to explain to employees under his supervision regarding what is required to receive a commendable performance rating is that they have to "know where the rocks are, implying that they basically have to be able to walk on water." (R2. 158: ¶ 29). This was not a statement by Mr. Croft made only to Petitioner and certainly is not racial in nature. Even assuming, *arguendo*, this statement was made, at best, it shows

Mr. Croft could have answered the question more specifically. It does not in any way, however, support a finding of pretext for unlawful discrimination.

Finally, Petitioner claims that all six members of the Interview Panel were white, three of the eleven candidates were black, and three white males were selected. (Pet. p. 6). The other African American male candidate for the Lead Technician position, however, had only 10 years of experience in the technician job classification, which was significantly less than the 24, 20, and 17 years of experience of the three successful candidates. (R2. 130: ¶ 31). And, although the one African American female considered for the position had 18 years of technician experience, she voluntarily withdrew from consideration for the position upon learning that the successful candidates would be required to relocate to a different service center. (R2. 130: ¶ 31).

3. Petitioner rebuffed Respondent's attempts to assist him in improving his chances for future promotions.

Petitioner's claim of discrimination is undermined by the fact that after Petitioner was not selected for the Lead Technician position, Respondent attempted to assist Petitioner in improving his chances for future promotions. (R2. 146: ¶ 16; R2. 309: 22-25; R2. 310: 1-7; R2. 441). Subsequent to the selection process, Respondent met with Petitioner and, among other things, gave him feedback on his performance during the interview process. Specifically, Petitioner was told that he needed to focus on improving his leadership, communication and interview skills. (R2. 146: ¶¶ 17, 18; R2. 315: 8-24). He was also told that continual training would help improve his opportunities for promotion; the successful candidates for the Lead Technician positions had each participated in several training classes in which Petitioner had chosen not to participate. Petitioner's response to Respondent's suggestion, however, was that he "was

not interested" in taking any more "damn training." (R2. 146: ¶¶ 12,18; R2. 147: ¶ 19).

Despite Petitioner's hostility, Petitioner's supervisor, Ritchie Croft, identified two training programs for Petitioner that focused on teamwork and personal effectiveness and discussed these programs with Petitioner. (R2. 147: ¶ 21; R2. 155: ¶¶ 20, 21; R2. 323: 14-25, R2. 326: 5-9, 17-21; R2. 327: 9-20; R2. 332: 22-25; R2. 333: 1-22; R2. 334: 8-14). In addition, Debbie Dennis, Human Resources Support and Diversity Manager, met with Petitioner to discuss his concerns about the selection process and attempted to schedule a follow-up meeting to present Petitioner with the comparison chart of Lead Technician candidates he had requested. Yet, Petitioner rebuffed Ms. Dennis' offer, declaring that unless she had a supervisor position for him, there was no need for them to meet. (R2. 2: ¶¶ 6, 7; R2. 3: ¶ 8; R2. 338: 23-25; R2. 339: 1-4; R2. 340: 12-16; R2. 346: 23-25; 347: 1-2, 3-15, 21-23). Ms. Dennis also arranged for an African-American male in management to provide career mentoring to Petitioner, but Petitioner refused to meet with him. (R2. 3: ¶ 10). Clearly, Respondent went out of its way to alleviate Petitioner's concerns with the selection process and to help Petitioner improve his opportunities for future promotions. Respondent's efforts and suggestions, however, were met with hostility and rebuffed by Petitioner.

In conclusion, Petitioner's claim that he was discriminatorily denied a promotion to the Lead Technician position in the Central Region clearly constitutes an instance where, as articulated by the Court in *Reeves*, no rational factfinder could conclude discrimination occurred. *See Reeves*, 120 S. Ct. at 2109. Undoubtedly, Petitioner's laundry list of attempts to establish pretext pale in comparison to the evidence of pretext put forth by the plaintiff in *Reeves*. At the absolute best, Petitioner has created a *weak* issue of fact as to whether Respondent's articulated reason for not promoting him was false. Moreover, there is abundant evidence that Petitioner was treated in a fair and non-discriminatory manner. In fact, after Petitioner

was not selected for the position, Respondent offered Petitioner guidance in improving his chances for future promotions, including identifying training programs and arranging for Petitioner to have a mentor. Clearly, no rational factfinder could conclude Petitioner was discriminated against and, accordingly, summary judgment for Respondent is proper.

B. No Rational Factfinder Could Conclude That Petitioner Was Discriminatorily Denied a Promotion to The Arlington Supervisor Position Because Petitioner Has Created No Genuine Issue of Fact as to Pretext and There Is Ample Uncontroverted Evidence in the Record That Petitioner Was Not Subject to Discrimination.

Due to the large number of employees and contract workers that the Arlington Supervisor would be responsible for supervising, Mr. Reeves concluded, and Ms. Morton agreed, that prior supervisory or lead experience was an essential job-related criteria for the Arlington Supervisor position.[16] (R2. 131: ¶ 36; R2. 27: ¶ 15). Accordingly, Mr. Reeves and Ms. Morton decided to only interview applicants who possessed this requisite job qualification. Petitioner was one of the approximately 27 applicants who did not have prior supervisory or lead experience and, thus, were not interviewed for the position. The candidate selected was a 27-year employee who possessed eight years of prior supervisory or lead experience. (R2. 28: ¶ 17; R2. 132: ¶ 37; R.133: ¶ 41).

Petitioner admits that in determining who is the most qualified candidate for a supervisory position, prior supervisory or leadership experience is a reasonable criteria to consider. (R2. 225: 3-19). Indeed, Petitioner also admits that he has no

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16. It is consistent with the Company's hiring practices for the hiring supervisor to identify job-related criteria he or she believes to be essential to the particular position being filled and to identify the candidates to be interviewed, considered, and ultimately selected based on those criteria. (R2. 27: ¶ 15).

facts or evidence to support his discrimination claim. Petitioner testified:

> **Q:** Is there **anything else, other than the denial of the interview**, that you can point to right now **that indicates that [Mr. Reeves] was discriminating against you based on your race?** Anything other than denying the interview?
>
> **A: Other than denial of the interview, I have nothing.**

(R2. 363: 1-11; R2. 364: 1-7). (Emphasis added).

In an attempt to show pretext, Petitioner claims, without any citation to the record, that Mr. Reeves decided to interview an African American male, Moses Ward, only after discussions with Ms. Morton, and that Mr. Ward did not have supervisory experience nor had he applied for the position. (Pet. p. 8). This assertion is blatantly untrue and *completely unsupported* by the record. In fact, Mr. Ward *did* submit an application for the Arlington Supervisor position, and Mr. Ward was added to the interview list because Ms. Morton believed Mr. Ward had prior supervisory experience. During Mr. Ward's interview, however, Mr. Reeves learned Mr. Ward did not, in fact, have prior supervisory experience and, accordingly, he was not selected for the position. (R2. 133-34: ¶ 44). Clearly, Respondent's actions regarding Mr. Ward have nothing to do with, and in no way cast doubt upon, Respondent's reason for not interviewing Petitioner.

Petitioner also contends that another employee, Don Shipley, who had no previous supervisory experience, was promoted to a different supervisor position in the Company, and that this fact evidences pretext. (Pet. p. 13). This argument fails for several reasons. Petitioner fails to produce any evidence concerning the job duties of the supervisory position Mr. Shipley was promoted to, or the relative qualifications and experience of the other applicants. Furthermore, even assuming Mr. Shipley was promoted to a supervisor position without any prior supervisory experience, Petitioner fails to show how this relates

to the position Petitioner applied for, or to Mr. Reeves' business decision to promote a candidate with previous supervisory experience to the Arlington Supervisor position. It is well-recognized that an employer does not discriminate by hiring the most qualified candidate. *See Grimes*, 102 F.3d at 143. *See also Scales*, 181 F.3d at 709, 712 (narrowing the candidate pool with "additional individualized qualifications" that are applied to all candidates is not sufficient evidence of pretext and summary judgment is proper).

Petitioner has failed to create a fact issue as to whether Respondent's legitimate, non-discriminatory reason for not promoting him to the Arlington Supervisor position is a pretext for unlawful discrimination. (R3. 531-532). Therefore, because no rational factfinder could conclude that Petitioner was discriminated against, summary judgment for Respondent is proper.

C. No Rational Factfinder Could Conclude That Petitioner Was Discriminatorily Denied a Promotion to The Mesquite Lead Technician Position Because Petitioner Has Created No Genuine Issue of Fact as to Pretext and There Is Ample Uncontroverted Evidence in the Record That Petitioner Was Not Subject to Discrimination.

With respect to the Mesquite Lead Technician Position, the Interview Panel rated Petitioner significantly lower than most of the other interviewees with respect to leadership, interpersonal and communication skills. Again, as with the Lead Technician Position for Central Region and despite the fact that Respondent had specifically told Petitioner to focus on improving such skills, Petitioner's low evaluation in these areas was a result of the manner in which he conducted himself during the interview process. Specifically: (i) Petitioner inquired as to who formulated the interview questions and then, rather then answering the questions, alluded to the fact that they were foolish; (ii) Petitioner was unwilling to respond, or gave very

brief and curt responses, to certain questions and, instead, referred the Interview Panel to his personnel file to obtain the information; and (iii) Petitioner questioned the credibility of the Interview Panel and the interview process by accusing the panel of having already made up their minds prior to the interviews as to who they were going to give the job. (R2. 167: ¶¶ 7, 8; R2. 172-173: ¶ 7; R2. 380: 21-25; R2. 381: 1-11).

Understandably, Mr. Rascon and Mr. Davis perceived Petitioner's conduct during the interview to be rude, confrontational and non-responsive, and concluded that Petitioner did not possess the requisite interpersonal, communication and leadership skills for the position. (R2. 167-168: ¶ 8; R2. 173: ¶¶ 8,11). Indeed, Petitioner does not dispute that he accused the interviewers of having selected who they were going to promote *prior* to the interview process and admits that the interviewers could have perceived his comments as questioning their integrity. (R2. 380: 21-25; R2. 381: 1-11; R2. 383: 17-25; R2. 384: 1-13).

In an attempt to show pretext, Petitioner claims that he had superior qualifications and technical experience than Mr. Norman. (Pet. p. 8). However, the members of the Interview Panel testified that while they viewed Mr. Norman's and Petitioner's technical skills as comparable,[17] Petitioner's rude and hostile behavior during his interview rendered him clearly *less* qualified than Mr. Norman for the position. Petitioner's unsubstantiated contentions are insufficient to show that the Interview Panel's reasons for its decision not to promote Petitioner to the Mesquite Lead Technician position are false. *See Scales*, 181 F.3d at 709, 712; *Price*, 119 F.3d at 337. Accordingly, because Petitioner has failed to create a fact issue as to pretext, summary judgment for Respondent is proper.

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17. The Interview Panel selected Dennis Norman, who had 12 years of experience as a technician, previous work experience in the Mesquite Service Center and familiarity with the distribution facilities in the region. Moreover, Mr. Norman exhibited strong interpersonal and leadership skills in his interview. (R2. 174: ¶ 12).

CONCLUSION

For all the above reasons, Respondent respectfully requests this Court to affirm the Fifth Circuit's decision that the district court properly granted Respondent's Motion for Summary Judgment in all respects and render that Petitioner's Writ of Certiorari be denied. In the event that this Court determines the Writ should not be denied based on its decision in *Reeves*, Respondent asserts, at a minimum, the Court should remand this case to the Fifth Circuit for further consideration in light of *Reeves*. Because the Fifth Circuit did not have the benefit of this Court's guidance in *Reeves* when it issued its February 17, 2000 opinion, under the circumstances, an order to remand the case to the Fifth Circuit would be an appropriate remedy, as opposed to a summary reversal in favor of Petitioner. In summary, Respondent asserts, however, that the Petitioner's Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

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